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Supreme Court of the United States

October Term, 1974

No. 74-100

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals in the above-referenced matter (Pet. App. A)[1] is reported at 501 F.2d 228.

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[1] As used herein, "Pet." refers to the Petition for Writ of Certiorari. "App." refers to the joint appendix in this Court; "TR" refers to the Transcript of proceedings at trial also on file with the Clerk.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1974. A Petition for Rehearing was denied by said court on June 11, 1974 (Pet. App. B). On July 10, 1974, Mr. Justice Douglas extended the time for filing a Petition for Writ of Certiorari to and including August 9, 1974 (Pet. App. C). The petition was filed on that date and was granted on February 18, 1975. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

PRINCIPAL QUESTION PRESENTED

Whether a defendant, in a criminal prosecution unrelated to the federal income tax laws, may invoke the protection of the Fifth Amendment privilege not to be "compelled in any criminal case to be a witness against himself . . . " to exclude incriminating answers to questions on his income tax returns.

SUBSIDIARY QUESTIONS PRESENTED

1. **Whether the seizure of telephone toll records of petitioner, and their subsequent admission into evidence, violated rights guaranteed to petitioner under Title 47, United States Code, § 605, under Rule 17 of the Federal Rules of Criminal Procedure, and under the First, Fourth and Ninth Amendments to the United States Constitution.**

2. **Whether various items of evidence admitted under the authority of Title 28, United States Code, § 1732(a)–the**

"business records" exception to the hearsay rule–should have been excluded because some of the material did not conform to the requirements of that section; and whether § 1732(a), as applied, is unconstitutional and violative of petitioner's Sixth Amendment right to confrontation of witnesses.

STATUTES INVOLVED

18 U.S.C. § 1084:

> **"Transmission of wagering information; penalties.**
>
> "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission . . . of bets or wagers . . . shall be fined not more than $10,000 or imprisoned not more than two years, or both."

28 U.S.C. § 1732(a):

> **"Record made in regular course of busines; photographic copies.**
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction,

occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affects its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

47 U.S.C. § 605:

"Unauthorized publication or use of communications.

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication

and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided:* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiring to violate Title 18, United States Code, § 1084. He was sentenced to prison for a term of two years. To prove that he was engaged in the "business of betting and wagering"

–an essential element of the conspiracy as charged–the Government offered into evidence petitioner's federal income tax returns for the years 1965, 1966 and 1967, on which returns petitioner had reported gambling as the principal source of his income. The returns were admitted over petitioner's objection.

A divided panel of the Court of Appeals for the Ninth Circuit filed an opinion reversing the judgment of conviction on June 5, 1972. The Government's Petition for Rehearing and Suggestion for Rehearing In Banc was granted, and on April 11, 1974, the Court of Appeals filed an opinion affirming the conviction, five judges dissenting. (Pet. App. A.) The majority held that notwithstanding the statutory compulsion to provide the Government with information on the return, petitioner could have asserted his Fifth Amendment privilege against self-incrimination therein, and his failure to do so rendered the privilege unavailable to him at the criminal trial (Pet. App. p. 9).

A number of subsidiary issues raised on appeal were rejected by the court without discussion (Pet. App. p. 52). Two of these subsidiary issues involve: (1) the introduction into evidence of telephone toll records over petitioner's objection that their seizure and subsequent admission into evidence was, among other things, violative of 47 U.S.C. § 605, and (2) the admission into evidence of excerpts from the "Daily Racing Form" over petitioner's objection that such publication did not conform to the requirement of a "business record" under 28 U.S.C. § 1732(a).

Relying upon *United States v. Sullivan*, 274 U.S. 259 (1927), and *Stillman v. United States*, 177 F.2d 607 (9th Cir. 1949), the majority of judges of the Court of Appeals

held that petitioner, as a taxpayer, could have asserted his Fifth Amendment privilege against self-incrimination on his tax returns and that failure to do so in the first instance rendered the privilege unavailable at a later date. The majority reasoned that the Fifth Amendment affords a privilege to refrain from answering when incriminating information is first requested, and that once answers are provided there is no concomitant right which can be invoked retrospectively to exclude them. Fundamental to the majority's reasoning was the notion that questions on income tax returns are directed to the public at large, rather than individuals "inherently suspect of criminal activities" in "an area permeated with criminal statutes."[2] Thus, the compulsion to provide the information was not deemed by the majority to be of a caliber which would render answers "involuntary."

The dissenting judges declined to analyze the constitutional question in terms of a "right-privilege" distinction and, instead, observed that the Fifth Amendment operates both as a privilege to refuse to answer and, when answers are nonetheless compelled, affords a defendant the right to exclude those answers in subsequent criminal proceedings (Pet. App. pp. 11, 12). The minority of the Court of Appeals were of the opinion that the application of the Fifth Amendment in the instant case should be governed by *Marchetti v. United States*, 209 U.S. 38 (1968), which held that the privilege is available to exclude incriminating answers on tax returns at trial, even though the defendant had failed to invoke his privilege on the tax return. Additionally, the dissent opined that the statutory compulsion (26 U.S.C. § 7203) to

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[2]See Albertson v. S.A.C.B., 382 U.S. 70, 79 (1965).

give truthful and complete answers on the return renders those statements compelled within the meaning of the Fifth Amendment and, accordingly, inadmissible in evidence in a prosecution against the declarant.

ARGUMENT

I

Petitioner's Objection To The Introduction Of His Federal Income Tax Returns Should Have Been Sustained.

No more cogent or succinct argument in support of petitioner's position can be made than that advanced in the dissenting opinion authored by Judge Koelsch of the Court of Appeals (501 F.2d 228, 230) (Pet. App. pp. 10 - 49). Petitioner hereby adopts the minority opinion of the Court of Appeals as his principal argument to this Honorable Court.

A. The "right" as opposed to "privilege" analysis of the constitutional question by the majority constitutes an inadequate basis for its ruling.

The holding of the majority of the Court of Appeals has as its premise that the Fifth Amendment creates a privilege against self-incrimination which must be asserted at the time it first becomes viable. Otherwise, the privilege is lost. While recognizing a defendant's Fifth Amendment "right" to exclude compelled statements which are self-incriminating, and further that petitioner was under a statutory compulsion to provide answers on his income tax returns, the majority declined to

find a Fifth Amendment "right" which can be invoked retrospectively. (Pet. App. p. 9.)

The purported distinction between a "right" and a "privilege" as applied to the constitutional mandates contained in the Fifth Amendment is illusory and cannot provide an adequate basis for the majority holding, for in *Graham v. Richardson,* 403 U.S. 365, 375 (1971), this Court declared:

> " . . . [T]his court now has rejected the concept that constitutional rights turn on whether a governmental benefit is characterized as a 'right' or as a 'privilege'."

See also *Sherbert v. Verner,* 374 U.S. 398, 404 (1963); *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

B. Acceptance of the majority opinion invites chaos in the Government's plan for collection of income taxes.

The minority opinion of Judge Koelsch suggests that, contrary to the assertion of the majority, a taxpayer might well be required to provide full and complete information on his income tax return, in exchange for a subsequent use immunity of such information, should it prove incriminating at some later time. The alternative to the granting of such use immunity is to permit a multitude of taxpayers to invoke their Fifth Amendment privilege not to provide full and complete answers on their tax returns and, in effect, hamstring the Internal Revenue Service in its determination of whether or not the returns thus filed are accurate. It takes little imagination to foresee the welter of complicated administrative procedures which the Internal Revenue Service will be required to undertake if the majority's ruling is allowed to

stand.

Finally, and as proof of the foregoing assertion, the Court's attention is invited to the Supplement and Addendum to the Petition for Writ of Certiorari with exhibits. Petitioner filed his 1973 tax return asserting his Fifth Amendment privilege against self-incrimination, along with an explanatory letter to the Internal Revenue Service. In return he received a letter from the Government indicating that his tax return was "not acceptable" and not a "return" and suggesting that criminal penalties might be forthcoming under 26 U.S.C. § 7203. (See Exhibit "C" annexed to the Supplement and Addendum.)

Although these matters do not constitute a part of the record before this Honorable Court, it would appear that petitioner is now faced with precisely that dilemma foreseen by Judge Koelsch in his dissenting opinion (Pet. App. pp. 45 - 46).

II

The Seizure of Telephone Toll Records Of Petitioner And Their Subsequent Admission Into Evidence Was Violative Of 47 U.S.C. § 605.

In this case, the Government subpenaed from the telephone company the records of telephone calls placed by petitioner from his private telephone. Petitioner's objection thereto was overruled by the trial court, and the toll slips were admitted into evidence (App. pp. 30 - 36). The records were offered by the Government to establish that calls had been placed from petitioner's phone to other telephones listed in

the names of co-defendants. From the existence of the calls, the jury was permitted to infer the content of the conversations, to wit, illegal gambling.

The first clause of 47 U.S.C. § 605 provides in part:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; . . . . "

This clause applies by its terms only to those employees involved in the actual transmission of communications. *Nardone v. United States,* 302 U.S. 379 (1937), 308 U.S. 338 (1939). The class of persons covered by this section has been narrowly construed by this Court and the lower federal courts. See *Nardone.* The Fifth Circuit analyzed the clause in *Hanna v. United States,* 393 F.2d 700 (1968), as follows:

> "In a broad sense all telephone employees assist in receiving or transmitting communications, for that is the end result of the telephone company's

> business. But, as the first *Nardone* appeal indicates . . . this first clause of Section 605 has reference to those employees to whom the communications necessarily become *known*. In fact, here the communications were sent and received by means of direct dialing without the use of a telephone central or other employee. There were no employees or persons whose transmitting and receiving duties permitted them to learn the contents of the telephone conversations. The first clause of Section 605 therefore has no application to the facts of this case." (393 F.2d at 705.)

The Fifth Circuit reconsidered the case at 404 F.2d 405. At that time, the court found that Section 605 was not applicable as to defendant Hanna, who had used a device in an attempt to avoid being billed for his long distance calls to defendant Modell. The court found Section 605 inapplicable, on the basis of *Sugden v. United States,* 226 F.2d 281 (9th Cir. 1955), in cases in which the use of the communication facility is illegal. With regard to Modell, the Fifth Circuit found that there would be no violation of Section 605 "in obtaining and divulging the statement of Modell if the telephone company employee who learned of the communications and thereafter divulged their existence and contents was, within the meaning of the first clause of Section 605, '[a] person . . . transmitting or assisting in transmitting . . . ' A security officer . . . should be included among [this class of] company employees . . . . That is true because the obligations imposed upon the telephone company by the Communications Act

and Internal Revenue laws . . . both authorized and required it to discover the existence and parts of the contents of the *illegal* calls." (Emphasis added.)

The court's rationale for allowing disclosure was to protect the integrity of the telephone company by allowing it to uncover fraud against the telephone company in the use of its facilities.

This view is consistent with that of the Ninth Circuit as enunciated in the case of *Bubis v. United States,* 384 F.2d 643 (1967). Section 605 creates two classes of individuals. The first clause creates a class consisting of two groups: (1) Those specifically authorized by the parties to the communication, and those employees of the communication facility to whom the communication necessarily becomes known; and (2) the second clause of Section 605 includes all those not in the first category. Members of the first class may divulge the information only through authorized channels, or to authorized recipients of the communication, to proper accounting officers or to a court of competent jurisdiction only under subpoena. All those not members of the class created by the first clause are forbidden by the second clause to intercept or divulge the communication under any circumstances. The Ninth Circuit has said in *Bubis, supra:*

> "The first part of the section is directed to those employees of systems of communications who have to do the *sending, receiving or forwarding* of interstate or foreign communications by wire or radio, and provides that no such person shall divulge or publish the existence, contents, substance, purport or effect . . . etc."

(384 F.2d at 646. Emphasis added.)

The court stated further that the second clause was designed to protect the integrity of the communication system and privacy "to those who use the facilities in a proper and normal manner" (at p. 647). The Ninth Circuit found the communication inadmissible because it was obtained without the "knowledge or consent of appellant or any of the persons with whom he spoke on the telephone" (at p. 647).

The court found, however, that when a subscriber violates his subscription rights through fraud on the telephone company, he is deemed to consent to monitoring. Even in this case, however, the court was careful to limit the use of the information to the fraud prosecution. See footnote 5 at page 648, in which the court explicitly decides that it would be difficult to find any implied consent on the part of the defendant to "disclosure for the purpose of convicting him of using interstate telephone facilities for gambling. Disclosure for this purpose contributed nothing either to the collection of long distance tolls . . . or to preventing him or others from thereafter using long distance telephone facilities without paying."

While it is clear that both *Hanna* and *Bubis* were concerned with special surveillance by telephone security agents, this difference is of little significance with regard to the instant case. Both the Fifth Circuit and the Ninth Circuit recognize that attempted fraud upon the telephone company provides an exception to Section 605 consistent with the intent of Congress to protect the integrity of the communication facilities. In the instant case, that exception is not applicable, since there was no attempt to defraud the

telephone company. Therefore, the clear mandate of Section 605 applies. The integrity of the facility is not at stake, and the first clause thus allows disclosure only by employees engaged in "sending, receiving, or forwarding" of communications. *Bubis v. United States, supra.*

In this case, the Government subpenaed from the telephone company the toll records of petitioner for calls placed by direct dialing. The initial inquiry is whether the billing department is included in the class of employees to whom the existence of the call necessarily becomes known. Initially, it must be noted that these employees are not involved in the actual sending, receiving or forwarding of the communication. Their function relates only to the necessary business operation of the telephone company. While it is possible that some member of the billing department may become aware, in the course of his employment, that a toll has been incurred of a particular amount, absent fraud there is no necessity for his knowledge of the exact number to which the call was placed.

Moreover, it should be noted that the accounting department is not authorized by the language of Section 605 to divulge the existence of the communication. Rather, the employees who are members of the class created in clause one are authorized to disclose the communication to the accounting department—again in order to protect the financial interest of the company. If the accounting department had been a member of the class of those employees to whom the communication necessarily becomes known, there would have been no reason to include a special authorization for disclosure *to* the accounting department. Allowing disclosure *by* the accounting department would

thus violate the obvious intent of the legislation.

The Seventh Circuit was confronted with a similar problem in a gambling and bookmaking prosecution in *Dote v. United States,* 371 F.2d 176 (1966), in which the court considered the issue "whether dial impluses which a pen register records are precluded from disclosure by clause two of 47 USCA 605" (at p. 179). The court found that the mere dialing of the number was a sufficient communication to be protected "if the activity of the initiating subscriber in dialing his telephone would result in a signal to the telephone of the recipient" (at p. 180). The court went on to say at page 181:

> "[8] The ringing of a telephone may be more than merely a signal indicating a call. Even if a call is not answered, a call at a certain time, or a certain number of rings, or repeated calls may well be a pre-arranged message or signal. The ringing of a telephone, therefore, may of itself be a communication, and a device attached to the telephone line, which indicates to a third party that such a communication is taking place or is about to take place, intercepts it. *United States v. Caplan, supra,* 255 F. Supp. at 808.
>
> "[9] Further, we cannot pretend that the Government, while not hearing any verbal communication, did not inferentially have a reasonably good notion of the general substantive nature of the communications the pen register indicated were being initiated. In circumstances such as those in this case, knowledge of the existence of the communication is knowledge of its likely

> character."

Similarly, in the instant case, the Government attempted to imply a substantive nature from the "existence" of the phone communications, in contradiction to Section 605. If the mere attempt at making a connection is to be considered sufficient communication for the purposes of Section 605, then, *a fortiori,* the existence of an actual connection invokes the protection of the section.

The Second Circuit has ruled that similar toll slips were admissible in *United States v. Covello,* 410 F.2d 536 (2d Cir. 1968). The court acknowledged that Section 605 created two classes of employees (at p. 541) and agreed that "Section 605 was not intended to apply only to the substance of communications" (at p. 542). The court reasoned, however, that in *Covello,* which involved a federal gambling prosecution, there was no concern with manipulative use of the pen register, but only the question of admissibility of records kept "in the ordinary course of the company's business." The court seemed to feel (see note 8 at p. 542) that if a court were willing to admit records obtained through monitoring, as in *Bubis,* records kept in the ordinary course of business should be admissible. The court failed to consider that *Hanna* and *Bubis* admitted the records only for prosecution arising out of fraud against the telephone company. While the reasoning in *Covello* may be relevant to the admissibility of the toll records in a fraud situation, the same argument is inconsistent with the reasoning of the Ninth Circuit in *Bubis,* which created an exception only for the fraud prosecution. The court in *Covello* takes the case out of Section 605 by resort to 28 U.S.C. § 1732, the Federal Business Records Act. The rationale is apparently that a procedure loses its

otherwise illegal character once its use becomes part of the regular course of a company's business. The mere fact that the telephone company engages in a particular practice on a large scale is patently irrelevant. The concept implicitly contains the notion that the existence of the toll slips is widely known and accepted and that, therefore, the subscriber somehow acquiesces in their use in a prosecution against him. This notion directly contradicts the statement in *Dote* quoted *infra* concerning the proper use of the toll slips as an aid to billing. A subscriber's "acquiescence"–if there is any–for use in facilitating the billing of toll charges does not imply an acquiescence for use in prosecution, and common sense dictates precisely the reverse conclusion. Moreover, the fact that these records are to be kept in order that the telephone company can accurately compute the federal tax imposed by 26 U.S.C. §§ 4251 *et seq.* militates against finding any "acquiescence" by the subscriber, who is left with the choice of having his calls monitored or the unrealistic alternative of not using his phone. Finally, the Government's purpose in introducing the toll slips was obviously to prove the existence of a communication. Their use for this purpose is clearly inappropriate even under *Covello*. See *Osborne v. United States*, 371 F.2d 913 (9th Cir. 1967).

Toll records kept in the course of the telephone company's business are designed to benefit the subscriber and the telephone company in order to resolve billing disputes. It is not the proper business use of the records to make them available to Government authorities for use in prosecution. As the court noted in *Dote, supra* (at p. 181)–

> "Of course, [the telephone company] may make a proper business use of a pen register with the consent of its subscriber. Its original use was to check dialing accuracy of new dial customers. Its service use has included a situation where a customer complains he is being charged for more calls than he makes. Thus, the pen register serves its intended business function."

The proper focus of inquiry, as noted in *Bubis* (at p. 647), is the reliance of the communicating parties with regard to freedom from governmental invasion of the right to privacy.

> "The same consideration may well have moved the Congress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution."
>
> *Nardone v. United States, supra*, 302 U.S. at 383.

The allowance of the divulgence of the existence of telephone communications in this case resulted in the inconsistent proposition that an individual is more extensively protected against governmental invasion through the use of a public telephone than in the use of a telephone in his private residence. See *Katz v. United States*, 389 U.S. 347 (1967).

In *DiPiazza v. United States*, 415 F.2d 99 (6th Cir. 1969), *cert. denied* 402 U.S. 949 (1971), the court found that the subscriber "authorized" the use of the slips–a finding with which petitioner has already taken exception. The court in *DiPiazza* went on to say:

> "Having held that the maintenance of the toll records and the making of the records does not constitute an 'interception' forbidden by § 605, we now deal with the appellant's contention that the submission of the records to the IRS was a 'divulgence' forbidden by § 605.
>
> "Only the first clause of 47 U.S.C. § 605 could be construed as prohibiting the telephone company from turning its records over to the Government since there was no interception of a message in violation of section 605's later clauses."

Petitioner contends that *DiPiazza* is either carelessly written or an incorrect interpretation of the applicability of the two clauses of Section 605. The case, however, provides an excellent basis for analyzing the section.

Section 605 operates under two variables: (1) the persons authorized to hear the conversation, and (2) the concept of interception versus non-interception. Petitioner submits that Section 605 covers all instances in which the existence, etc. of a call becomes known. If the existence is ascertained because it "necessarily becomes known" to the persons described in clause one, divulgence is allowed under certain conditions. Any other means of discovery of the existence of the call is an interception under clause two and divulgence is prohibited. As noted above, in *Bubis*, the court found that the first clause created a class including telephone employees to whom the conversation necessarily becomes known, as well as those persons who are authorized by the parties. The second clause includes *all other persons*. Members of the first class are defined as people to

whom the transmission is made known *without resort* to *any* "interception." The first clause makes no mention of "interception" precisely because the individuals in the first class are aware of the existence of the call without resort to an interception. The persons described in the second clause, who are *all* persons not employed in the "sending, receiving or forwarding" nor authorized specifically by the parties, may not divulge the existence of the call at all. These persons are described by the fact that they can only discover the existence of the call through an "interception." Since this clause includes all those not in the first clause, "interception" is necessarily defined as *any* means which is used to discover the existence, etc. of a call by persons not defined in the first clause. Thus, excluding those persons not specifically authorized by the parties, there is an interception any time anyone who is not engaged in "sending, receiving or transmitting" becomes aware of the existence of a call; and divulgence is therefore prohibited. Thus, divulgence is only allowed under clause one; and the divulgence may only be through persons engaged in "sending, receiving or transmitting" to whom the existence of the call "necessarily becomes known." There is no such person in the case of direct dialing, and the divulgence of the "existence" of the call is prohibited.

III

Excerpts From The Daily Racing Form, Admitted Under The Authority of 28 U.S.C. § 1732(a), Should Not Have Been Admitted In That The Material Did Not Conform To The Requirements Of That Section, And § 1732(a)

Is Unconstitutional And Violative Of Petitioner's Sixth Amendment Right To Confrontation Of Witnesses.

Several excerpts from the Daily Racing Form were admitted in evidence over petitioner's objection, in order to prove that particular horses had raced at given times and race tracks (App. pp. 36 - 49).

Initially, it is difficult to imagine how the Daily Racing Form is considered to be a business record of the California Horse Racing Board. The form is compiled by a private agency, for its own business purposes; the employees of the Horse Racing Board do not compile, edit, correct, or authenticate the records. The sole claim the form has for admissibility is that the Board calls it "official." This title, obviously, in no way secures the accuracy of the contents. It is by no means clear that the Board would have the power to compel the Daily Racing Form to change inaccuracies in its compilation. Under these circumstances, the form cannot logically be deemed compiled "in the regular course" of the Horse Racing Board's business. Moreover, as was stated in *Sabatino v. Curtiss National Bank of Miami Springs,* 415 F.2d 632 (5th Cir. 1969), *cert. denied* 396 U.S. 1052, the offered items "must not themselves be mere cumulations of hearsay."

In any event, petitioner submits that the Federal Business Records Act violates, at least in some circumstances, the Sixth Amendment right to confrontation of witnesses. *State of Ohio v. Tims,* 90 S.2d 136 (1967) [9 Ohio 2d .....]. In *Tims,* the Ohio court stated:

" . . . As was said in *Pointer v. Texas,*

380 U.S. 400, at 405:

" 'There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.'

"This right of confrontation includes the right of cross-examination of the person who is the actual witness against him. If applicable in a criminal case, the Business Records as Evidence Act denies him such right. The act permits the introduction of evidence in the form of records without requiring the presence of the person who actually made the examination. It is this person who is the actual witness against the accused, not the custodian, and it is this witness that the accused has the right to cross-examine to determine his qualifications and to determine whether the tests were made properly."

Admittedly, there is little authority for this portion of petitioner's argument; however, this in no way limits its efficacy. In *Hanley v. United States,* 416 F.2d 1160 (5th Cir. 1969), the court found that the Business Records Act did not violate the Sixth Amendment. That case relied on *McDaniel v. United States,* 343 F.2d 785 (5th Cir. 1965), where, on the contrary, the court stated, at page 789, that

not all records which come under the Business Records Act meet the standards of the Sixth Amendment. The court in *Hanley* and *McDaniel* felt that *reliability* was insured by conformity to the Business Records Act. Reliability may be sufficient to satisfy the hearsay requirement in a civil case, but it is not sufficient to satisfy confrontation. In *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930 (1970), this Court analyzed the difference between confrontation and hearsay, and concluded that there was not complete overlap. Hearsay protects reliability through emphasis on the circumstances; confrontation, on the other hand, looks to the source. The latter is constitutionally protected in criminal proceedings. See *Berger v. California*, 393 U.S. 314, 89 S. Ct. 540 (1969). Thus, at least in the case in which the source does not submit to cross-examination on his perception, truthfulness, etc., admission of records under the purported authority of Section 1732(a) is unconstitutional and grounds for reversal.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

BURTON MARKS,
A Member of
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Attorney for Petitioner

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on APRIL 9th, 1975, I served the within BRIEF FOR THE PETITIONER (No. 74-100 - October Term, 1974) on the following named parties by depositing the designated copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530 (3 copies)

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR, U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012 (2 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on APRIL 9th, 1975, at Huntington Beach, California.

D. A. Standefer

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